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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 85

ASSOCIATION OF DATA PROCESSING SERVICE ORGANIZATIONS, INC., and DATA SYSTEMS, INC., *Petitioners,*

v.

WILLIAM B. CAMP, Comptroller of the Currency of the United States, and AMERICAN NATIONAL BANK AND TRUST COMPANY, *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF ON BEHALF OF THE AMERICAN BANKERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

This brief, filed with the written consent of all parties, is submitted in support of the respondents in the above named case on behalf of The American Bankers Association. The Association also filed a brief in support of the petition for writ of certiorari.

QUESTION PRESENTED

Whether a firm engaged in the business of providing data processing services to the public—an unlicensed, unregulated business in which any member of the public can freely engage—has standing under the Bank Service Corporation Act to sue to enjoin a national bank from competing against such firm in said business, on the ground that engaging therein is beyond the powers of national banks under the National Bank Act.

STATEMENT OF THE CASE

This action was commenced by petitioners, a trade association of data processors and a member of that association, against the Comptroller of the Currency as supervisor of the national bank system and against the American National Bank and Trust Company, a national banking association which, incidental to its banking services and pursuant to a ruling of the Comptroller,[1] performs data processing services for other banks and bank customers.

In the courts below, petitioners sought to have the Comptroller's ruling declared unlawful and to enjoin the Comptroller from permitting any national bank to make available its data processing equipment for other banks and bank customers. The complaint of petitioners also sought a declaratory judgment, an injunction and an award of compensatory damages against American National Bank on the ground that its data

[1] The current text of the Ruling (Par. 3500) reads: *Utilization of data processing equipment.* Incidental to its banking services, a national bank may make available its data processing equipment or perform data processing services on such equipment for other banks and bank customers.

processing activities were not incidental to the business of banking and were beyond the powers granted to national banks under the National Bank Act.

Prior to trial, the respondents' motion to dismiss the complaint for lack of standing to sue was granted by the District Court, 279 F. Supp. 675 (D. Minn. 1968), and the Court of Appeals for the Eighth Circuit affirmed, 406 F. 2d 837 (1969).[2]

INTEREST OF AMICUS CURIAE

The American Bankers Association is a trade association having as members approximately 13,600 commercial banks, of which about 4,800 are national banking associations, chartered under and deriving their powers from the National Bank Act, and about 8,800 are State or District banks chartered under and deriving their powers from the laws of the several States and the District of Columbia. According to preliminary reports from an automation survey conducted by the Association in April, 1969, as many as 2,000 of these banks perform data processing services for other banks and bank customers.

The American Bankers Association is interested in this litigation for two reasons:

1) Because an unfavorable decision with respect to automated customer services might impede the development of future automated payments systems based on the use of automated data processing equipment, and might thereby interfere with the ability of the com-

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[2] This decision conflicts with the later decision of the Court of Appeals for the First Circuit in *Wingate Corporation* v. *Industrial National Bank*, 408 F. 2d 1147, petitions for writs of certiorari pending, Nos. 129 and 225, Oct. Term, 1969.

mercial banking system to perform its vital functions for the benefit of business, the government, and the public; and

2) Because a decision that national banks may not engage in automated customer services, when virtually all State banks are permitted to do so, would place national banks at a serious competitive disadvantage with State banks, and might have the most unfortunate results for the dual banking system. *Cf. First National Bank of Logan* v. *Walker Bank and Trust Company*, 385 U.S. 252, 261 (1966).[3]

The American Bankers Association does not propose to consider in this brief the general question of standing to challenge a ruling of a Federal official that a national bank may perform certain functions under the

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[3] In 1967, after the institution of the pending case, the American Bankers Association conducted a survey of State statutes and rulings by State bank supervisors on the subject of automated customer services. In several States, statutes were found specifically authorizing state banks to provide data processing services for their customers. See, for example, Massachusetts Anno. Laws § 48 (15), Mississippi Code § 5224(i), Missouri Anno. Code § 362.105(11), and New Jersey Statutes Annotated 17:9A-25(14). Since 1967 the following states have also enacted similar statutes: Iowa 1969 Laws Division VIII § 804, Ohio Rev. Code Anno. § 1107.34, West Virginia 1969 Laws § 31A-4-37. In many other States, statutes were found authorizing State banks to perform incidental banking services, generally comparable to the corresponding provisions of the National Bank Act. In addition, advice was received from virtually all State bank supervisors to the effect that they had approved the performance of data processing services by State banks under their jurisdiction, under the terms of the applicable State statutes. Copies of several of these letters are set forth in the Appendix to the brief submitted by the Association in support of the petition for writ of certiorari in this case. Additional letters from State bank supervisors in connection with this survey were inserted in the record of the hearings on H. R. 6778, 91st Congress, at pages 588-606.

National Bank Act. This issue is of special concern to, and within the special competence of, the respondents, particularly the Government.

On pages 30 through 41 of their brief, however, petitioners set forth the argument that the Congress, in the Bank Service Corporation Act of 1962, and especially in Section 4 of that Act, has evidenced a legislative purpose to protect the interests of data processing firms against competition by banks which is sufficient to give them standing to maintain this suit. The American Bankers Association was closely involved in the legislative proceedings leading up to the enactment of the Bank Service Corporation Act of 1962, which the Association initiated and supported in order to make it possible for small banks to join together to get the benefits of electronic data processing equipment, and the Association has also followed closely the efforts of petitioner, Association of Data Processing Service Organizations Inc., to bring about the enactment of legislation to prohibit banks from performing data processing services for other banks and bank customers.

The American Bankers Association considers, therefore, that it is in an appropriate position to reply to petitioners' argument that the Bank Service Corporation Act gives them standing to sue.

SUMMARY OF ARGUMENT

The American Bankers Association takes the position that the Bank Service Corporation Act does not provide petitioners with standing to challenge a ruling of the Comptroller of the Currency authorizing national banks to engage in data processing.

The Bank Service Corporation Act and its legislative history make it clear not only that there was no

legislative purpose to protect the interest of data processing firms against competition by banks, but that, on the contrary, there was a legislative purpose not to provide such protection.

The purpose of H.R. 8874, 87th Congress, which became the Bank Service Corporation Act, was to authorize certain Federally regulated banks to hold stock in jointly owned service corporations, and the purpose of Section 4 of the Act was to limit the activities of these service corporations. During the consideration of H.R. 8874 it was repeatedly brought to the attention of the Congress that banks were at that time performing data processing services for other banks and bank customers and in spite of this fact the Congress did not insert in Section 4 or any other part of H.R. 8874 any provision limiting or restricting or prohibiting the performance of data processing services by banks for other banks or bank customers.

Legislative proceedings subsequent to the enactment of the Bank Service Corporation Act reinforce the conclusion that the Congress has evidenced a legislative purpose not to protect data processing firms against competition by banks.

ARGUMENT

I

IN ENACTING THE BANK SERVICE CORPORATION ACT OF 1962, CONGRESS EVIDENCED A LEGISLATIVE PURPOSE NOT TO PROTECT DATA PROCESSING FIRMS AGAINST COMPETITION BY BANKS AND, THEREFORE, THE ACT DOES NOT PROVIDE PETITIONERS WITH STANDING TO COMPLAIN OF A RULING BY THE COMPTROLLER OF THE CURRENCY WHICH AUTHORIZES NATIONAL BANKS TO ENGAGE IN DATA PROCESSING

The Purpose of the Bank Service Corporation Act of 1962 Was To Permit Certain Banks To Invest in Subsidiary Service Corporations

Petitioners contend on page 7 of their brief that "[i]n the Bank Service Corporation Act . . . Congress clearly indicated a legislative purpose to protect data processors against bank competition" and that, consequently, the Bank Service Corporation Act provides petitioners with the requisite statutory standing to complain of a ruling by the Comptroller of the Currency made pursuant to the National Bank Act which authorizes national banks to perform data processing services for other banks and bank customers.

The following excerpts from House and Senate hearings, reports, and Floor debates on H.R. 8874 indicate that the purpose of this bill, which later became the Bank Service Corporation Act of 1962, was to waive the restrictions of certain statutes which prohibited stock ownership by national and other banks and to make it possible for small banks to join together to obtain the benefit of up-to-date data processing equipment for themselves and their customers. The opening statement by Chairman Martin of the Federal Reserve Board at the House hearings on July 19, 1962, makes this clear:

> Next, I will offer some observations and suggestions concerning the bill H.R. 8874, which would

authorize member banks of the Federal Reserve System to invest in "bank service corporations." As set out in its report on H.R. 8874 to your committee, the Board favors the objective of the bill, but suggests some changes in it.

The bank service corporations established under the bill would serve as a means whereby banks—and especially small and medium-size banks—and their customers could benefit from the improved efficiency and economies possible today only through automation. The operations of a bank entail a tremendous volume of data processing, such as the various kinds described in section 2(a) of the bill. At one time much of this was associated with the high desk and quill pen. Today, high speed electronic and related mechanical equipment designed to handle this work is being used by banks with increasing frequency.

Notwithstanding the high initial cost of equipment of this kind, some banks—especially the larger banks—are purchasing or leasing this equipment. Other banks are gaining access to this equipment through various contractual arrangements with data processing centers operated by private commercial concerns, and some banks that have purchased or leased this equipment are doing data processing for other banks and business concerns.

Under the bill, two or more banks would be able to pool their resources through the corporate device in order to gain the benefits—for themselves and for their customers—of this expensive equipment. This approach to the problem is not now open to member banks, because they are quite limited by the Federal banking laws as to the stock or securities that they may acquire. Of course, even if this bill is enacted, State member banks will be able to invest in bank service corporations only if authorized to do so by State law, but I

understand that at least six States have recently enacted laws that specifically authorize such investments by State banks. (House Hearings on H.R. 8874, 87th Congress, pages 33-34.)[4]

The testimony of the Comptroller of the Currency, James J. Saxon, was equally clear.

H.R. 8874 would give authority to member banks and district banks to invest in corporations organized to perform clerical services for them. This reflects a growing need of our banks in this day and age. The introduction of high cost electronic equipment for bookkeeping, sorting, and data processing has imposed a hardship upon the small bank, which can neither afford to continue older, less efficient techniques nor to buy new equipment.

Because of the ever-increasing complexity of banking operations, the needs for modernization will multiply. Enactment of this legislation will enable two or more small banks jointly to own and acquire necessary equipment, which perhaps neither could afford alone. It will thus permit them to compete with the larger banks who have obtained such equipment.

It is of note that the legislatures of Connecticut, Iowa, Maine, Massachusetts, Michigan, Ohio, Pennsylvania, Virginia, and South Carolina have enacted laws which permit State nonmember banks to own stock in service corporations. We have received a considerable number of responses from national banks in connection with the banking survey being undertaken by the advisory committee which I appointed, recommending making

[4] Mr. Frederic Solomon, Director of the Division of Examinations of the Federal Reserve Board, made a similar statement at the Senate hearings (Senate hearings on H. R. 8874, p. 64).

this power available to national banks. (House hearings on H.R. 8874, pages 38-39.)[5]

The House and Senate reports on the bill also indicated that the purpose of the bill was to waive provisions of Federal law prohibiting national banks and State banks from owning corporate stock.

House Report No. 2062—87th Congress

H.R. 8874 would enable banks to utilize modern equipment through stockownership in a jointly owned service corporation. At the present time nine States have enacted legislation specifically authorizing State banks to invest in bank service corporations, and in New York and possibly other States, State banks are authorized to invest in such service corporations under general provisions of the code. However, Federal law prevents national banks and certain other Federally supervised banks from sharing this privilege because of investment restrictions in the applicable Federal statutes.

The bill removes all limitations and prohibitions of Federal law exclusively relating to banks, regardless of how owned, which would otherwise prevent banks from investing up to 10 percent of their capital and surplus in bank service corporations. (House Report No. 2062, page 1.)

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[5] Mr. Jesse P. Walcott, a director of the Federal Deposit Insurance Corporation, made a similar statement during the House hearings (at page 46) as did Mr. Erle Cocke, Chairman of the Federal Deposit Insurance Corporation, and the Comptroller during the Senate hearings on H. R. 8874 (at pages 57-58 & 54). Parallel remarks on behalf of national and State bankers' associations and individual banks were also made throughout the House hearings (House hearings on H. R. 8874, pages 54-62, 73-90) and the Senate hearings (Senate hearings on H. R. 8874, pages 14-20, 74-78, and 92-94).

Senate Report No. 2105—87th Congress

> [S]everal Federal laws prevent national banks and certain other Federally supervised banks from sharing [the privilege of joint ownership of service subsidiaries.] . . . H.R. 8874 would waive (within limits based on capital and surplus) all limitations or prohibitions contained in Federal banking laws on the ownership by two or more banks of stock in a bank service corporation. (pages 1 and 2)
>
> The bill would free from any limitation or prohibition otherwise imposed by any provision of Federal law, exclusively relating to banking (including, for example, 12 U.S.C. 24, 12 U.S.C. 84, 12 U.S.C. 335, and 12 U.S.C. 1845), an investment of not more than 10 percent of the paid-in and unimpaired capital and unimpaired surplus of each of the two or more investing banks. (page 5)

Similar statements were again made on the Floor of the House in connection with the discussion of the rule permitting the consideration of H.R. 8874, (108 Cong. Rec. 16496), and in connection with the consideration of the bill (108 Cong. Rec. 16498).

In addition to this volume of testimony to the effect that H.R. 8874 was introduced for a very limited purpose and surely was not designed to affect the data processing activities of banks undertaken pursuant to some other law,[6] there are further positive statements

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[6] Senator Proxmire himself clearly recognized in his Supplemental Views that no new statute was needed to permit national or State member banks, or insured nonmember banks for that matter, to acquire or get access to data processing equipment:

> Many commercial banks have already purchased data-processing equipment to replace obsolete or less efficient systems. Other banks are now purchasing data-processing services from existing, private data-processing firms. It should be clearly understood that these two methods of utilizing modern accounting and data-processing services are already open to banks (Senate Report No. 2105, page 7).

in the history of this legislation which show a conscious Congressional intention not to become involved in the rights or powers of banks. For example, Congressman Multer, then a senior member of the House Banking and Currency Committee, made these remarks during House debate on the bill:

> Mr. Chairman, I would like to make clear that the bill is not intended to go outside of the very language appearing in this bill. It is not intended to interfere with any of the rights banks now have, and as they do presently, to arrange for any of these services to be performed for them by independent agencies or independent contractors. This will not interfere with any authority now vested in banks by virtue of any of the banking laws of either the State governments or the Federal Government. It merely sets up a new means by which individual banks can acquire these additional services. (108 Cong. Rec. 16500)

The Purpose of Section 4 of the Bank Service Corporation Act Was To Restrict the Activities of Bank Service Corporations; Section 4 Does Not Apply to the Activities of Banks and It Was Not Intended To Protect Anyone From the Activities of Banks

The legislative history of Section 4 of the Bank Service Corporation shows a transition from a very general provision, which not unreasonably gave concern, under which a substantial part—at least 50%—of the activities of a bank service corporation might consist of the performance for industrial and commercial concerns of services completely unrelated to banking or banking functions, to a narrow provision, adopted under pressure in order to prevent the death of the bill at the adjournment of Congress, under which bank service corporations were limited to the performance of bank services for banks. But the legislative

history of the section does not indicate any legislative purpose to do anything except what Section 4 on its face provides—a limitation on the activities of bank service corporations themselves.

H.R. 8874 as originally introduced authorized a national bank or a State member bank to invest in the stock of a bank service corporation, which was defined as:

> a corporation whose primary purpose is to perform for two or more banks, each of which has an investment in such corporation, services such as check and deposit sorting and posting, computation and posting of interest and other credits and charges, preparation and mailing of statements, notices, and similar items, or any other similar clerical or bookkeeping function. (House hearings on H.R. 8874, p. 31.)

The House Banking and Currency Committee rewrote this "primary purpose" provision as Section 4 of the bill as follows:

> *Sec. 4.* No bank service corporation may engage in any revenue-producing activity other than the performance of bank services for banks and, to an extent not exceeding one-half of its total activity, the performance of similar services for persons or organizations other than banks. (Senate hearings on H.R. 8874, pages 9-10.)[7]

In this form, Section 4 was reported by the House Banking and Currency Committee on July 30, 1962 (House Rep. No. 2062, 87th Congress). Congressman Patman and Congressman Gonzalez filed dissenting views, primarily relating to the danger of anticompetitive abuses with respect to banks not belonging to a

[7] A definition of "bank services" following the language of the original bill was inserted in section 1(b) of the Committee bill.

bank service corporation. The bill passed the House on August 14, 1962 (108 Cong. Rec. 16495-16503).

The Senate Banking and Currency Committee began its hearings on H.R. 8874 on August 30, 1962, and thereafter considered amendments to the House bill, including particularly Section 4.

Under the House version of H.R. 8874, a bank service corporation could perform "similar services for persons or organizations other than banks." In other words, under the House bill, a bank service corporation could, up to half its total activity, perform *any* clerical function, *any* bookkeeping function, *any* accounting function, *any* statistical function, or *any similar* function, for *any* person or organization in the world. The House bill did not require that the performance of these functions for nonbanks be limited to those which might be part of the business of banking, or related or incidental to the business of banking.

The minority of the Senate Banking and Currency Committee, therefore, had some reason to take the position that this authorization for bank service corporations to perform "similar services" for persons or organizations other than banks was a very broad provision, and was subject to abuse, and permitted banks to engage in unrelated nonbanking business, which might impair the solvency of banks. (Pages 10-11 of Senate Report No. 2105, 87th Congress.) The majority of the Committee agreed that there was a possibility of abuse, but were concerned that any amendment to the bill might give an opportunity to kill the bill and in any event were persuaded that the bank regulatory agencies could control the situation and prevent abuses. (See Senate Report No. 2105, pages 7-8.) The Committee report warned against abuse of the provision and urged the supervisory agencies to prevent abuses

(page 3), urged that bank service corporations limit their nonbank customers to savings and loan associations, credit unions and other lending institutions (page 5), and expressed the expectation and the hope that the total activity for nonbank organizations would be small (page 6).

The Committee finally voted 10 to 5 against amending the bill, and it was reported to the Senate on September 18, 1962, (Sen. Rep. No. 2105) with only one dissent recorded (108 Cong. Rec. 21312). Senators Proxmire, Douglas, and Neuberger, and Senators Muskie and Clark filed two sets of Supplemental Views, expressing concern over the points mentioned above and over the anticompetitive problems which might arise in the operation of the service corporations.

On September 29, 1962, Senator Robertson, the Chairman of the Senate Banking and Currency Committee, discussed the bill in the Senate. He stated that three Senators were opposed to the bill and therefore it could not be brought up in the closing days of the session (108 Cong. Rec. 21311-21313, 22027-22032).[8] However on the basis of strong support from Senator Dodd of Connecticut on behalf of a group of Connecticut banks which were seeking to set up a bank service corporation, the bill was taken up on October 3, 1962, after the sponsors of the bill had reluctantly agreed to accept the Proxmire amendment which become Section 4 of the Bank Service Corporation Act:

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[8] The second session of the 87th Congress ended on October 13, 1962; Senate leaders are reluctant to bring up a controversial bill which might be the subject of extended debate during the closing days of a session, unless the bill is of the utmost importance. See Senate Report No. 2105, pages 7-8.

> *Sec. 4.* No bank service corporation may engage in any activity other than the performance of bank services for banks.[9]

This new Section 4, as revised by the Proxmire amendment, obviated the concern expressed by both the majority and the minority members of the Senate Banking and Currency Committee over the possibility of abuse of the authority of bank service corporations to perform a broad range of services in situations having no relation, incidental or otherwise, to the bank or to the banking business.

During consideration of H.R. 8874 by the House Committee a new provision, Section 5, unrelated to bank service corporations or to the purpose of that bill, was added at the request of the Federal Reserve Board and the Federal Deposit Insurance Corporation and over the objection of the Comptroller. The new section prohibited all insured banks from having service bureaus or other firms perform services for them, unless the bank regulatory agencies were permitted to regulate and examine the performance of such work. The fact that Congress added this new and unrelated provision to H.R. 8874 makes even more significant the fact that Congress could have added (but did not) a provision prohibiting banks themselves from performing data processing services for other banks and

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[9] Chairman Spence sought to obtain House approval of the Senate amendment on October 4, 1962, so that the bill could be sent to the President without a conference, but he was unable to do so because of an objection from Congressman Patman (108 Cong. Rec. 22307). On the following day, however, October 5, 1962, Congressman Patman brought the bill up himself and obtained unanimous consent for the House to concur in the Senate amendment (108 Cong. Rec. 22612), sending the bill to the President, who signed it into law on October 23, 1962 (P.L. 87-856; 76 Stat. 1132; 12 U.S.C. 1861-1865).

bank customers at the time they were adopting the Proxmire amendment to Section 4, which prohibited bank service corporations from doing so. (Of course, there is no assurance that a bill containing such a provision would have become law. What a bill does not provide may be just as important as what it does provide, in the resolution of forces leading up to the enactment of a controversial bill.)

The reluctant acceptance of the Proxmire amendment to Section 4 does not evidence any legislative purpose to protect data processing firms from competition by banks, such as would provide a basis for standing in this suit. On the contrary, the limited nature of the Congressional purpose in the acceptance of this amendment is shown by the fact that the activities of savings and loan service corporations are not restricted to the performance of services for savings and loan associations.

The original House version of H.R. 8874 authorized savings and loans, among others, to participate as members in the new bank service corporations. (See Senate Report No. 2105, page 5.) Although this authority was never deleted, it was rendered meaningless by the Proxmire amendment which prohibited bank service corporations from performing any activities except bank services for banks.

The denial to savings and loan associations of the opportunity to use the facilities of bank service corporations resulted in a provision in the Housing Act of 1964 (P.L. 88-560, Sec. 905; 12 U.S.C. 1464(c)), which permits Federal savings and loan associations to form and join savings and loan service corporations. Under Federal Home Loan Bank Board regulations,

these corporations may perform bookkeeping, accounting, statistical or other functions "primarily for savings and loan associations" (12 Code of Federal Regulations Sec. 545.9-1, as amended effective March 16, 1968). The Board also issued a statement of policy which spelled out further the activities such savings and loan corporations could perform "primarily for savings and loan associations," specifically including data processing services (12 Code of Federal Regulations, Sec. 556.3; 32 Federal Register 15747, November 16, 1967).

Assuming, then, that there can be found a Congressional purpose to protect data processing firms from some kind of competition, the protection is of extremely limited scope. It does not even apply to competition by savings and loan service corporations.

During Consideration of H.R. 8874 the House and Senate Banking and Currency Committees and the House of Representatives Were Informed That Banks Were at the Time Performing Data Processing Services for Other Banks and Business Firms and No Action To Restrict or Prohibit Such Activities Was Taken

During the course of consideration of H.R. 8874 in the House and the Senate, both the House Banking and Currency Committee and the Senate Banking and Currency Committee were informed that larger banks which could afford to acquire data processing equipment themselves were not limiting their use of this equipment to the performance of bank services for themselves, but, on the contrary, were using this equipment to provide data processing services for other banks and for business customers. Chairman Martin of the Federal Reserve Board testified at the House

hearings on H.R. 8874 to this effect (House hearings on H.R. 8874, page 34):

> Notwithstanding the high initial cost of equipment of this kind, some banks—especially the larger banks—are purchasing or leasing this equipment. Other banks are gaining access to this equipment through various contractual arrangements with data processing centers operated by private commercial concerns, and *some banks that have purchased or leased this equipment are doing data processing for other banks and business concerns.* (Emphasis supplied.)[10]

During the House debate on H.R. 8874, Congressman Roosevelt of California expressed the fear that the bill, in addition to permitting banks to collaborate together to perform data processing services, would enable them to compete with private data processing firms. (See page 31 of petitioners' brief.) Congressman Reuss, a member of the House Banking and Currency Committee, in replying to Congressman Roosevelt's inquiry, made it clear that banks were able to furnish data processing services directly, but not through subsidiary corporations.

> *Mr. Reuss.* Further on the point raised by the gentleman from California I would call his attention to the fact that a big bank which has its own data processing equipment is now able, without limitation, to go into the business of furnishing these services; so really this makes the situation referred to by the gentleman from California better rather than worse.

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[10] The same remarks were made in the statement of Mr. Frederic Solomon of the Federal Reserve Board staff presented to the Senate Banking and Currency Committee. (Senate hearings on H. R. 8874, page 64.)

Mr. Roosevelt. The gentleman from Wisconsin is telling me a bank like the Bank of America can, through a subsidiary corporation, provide these services for itself, then get into competition with other businesses?

Mr. Reuss. Not through subsidiary corporations. There is a limitation.

Mr. Roosevelt. As part of the banking service to outside people?

Mr. Reuss. That is correct. This limitation improves the situation. (108 Cong. Rec. 16501)

Petitioners argue that Congressman Reuss' statements that "this makes the situation . . . better rather than worse" and "this limitation improves the situation" make sense only if interpreted as implying that Congressman Reuss believed the bill "restricted banks as well as bank service corporations from performing data processing services." This interpretation imputes to Congressman Reuss a surprising ignorance of the text of the bill under discussion. As we have mentioned Section 4 of the bill as reported to the House, required that fifty per cent or more of the work of a bank service corporation should consist of providing bank services for banks. The language of Section 4 as reported was designed to impose this 50% limit and nothing more. Section 4 clearly imposed no restriction whatsoever on the activities of banks.

A more reasonable interpretation of Congressman Reuss' remarks is that he simply meant that a "situation" in which the new bank service corporations could only perform a maximum of 50% of their data processing work for others would be "better," in the sense of being more restrictive, than would be the existing "situation" (which the bill would not change) in which

there were no limits on the percentage of data processing services that banks were able to perform for other banks and bank customers.

II

IN LEGISLATIVE PROCEEDINGS SUBSEQUENT TO THE ENACTMENT OF THE BANK SERVICE CORPORATION ACT, CONGRESS CONTINUED TO EVIDENCE A LEGISLATIVE PURPOSE NOT TO PROTECT DATA PROCESSING FIRMS AGAINST COMPETITION BY BANKS

Bills To Restrict Bank Services

Since the enactment of the Bank Service Corporation Act several bills have been introduced in the House to prohibit banks from performing certain services, including particularly data processing services, for their depositors, borrowers or other customers. Arguments as to the authority of banks to perform these services and as to the desirability of their continuance were again and again presented to the Congress. In no case did the Congress prohibit such activities and in one case a provision which would have imposed such a prohibition was deleted. These facts—Congressional action on one bill and inaction on others—are persuasive of a continuing legislative purpose to refrain from protecting the interests of data processing firms from competition by banks—a purpose which cannot be reconciled with petitioners' claim of statutory aid to standing.

On February 25 and 26, 1964, hearings were held before the Subcommittee on Bank Supervision and Insurance of the House Banking and Currency Committee on H.R. 9548 and H.R. 9822, 88th Congress. H.R. 9548 would have prohibited any insured banks from performing bookkeeping, statistical, accounting or similar services, except incidental to the bank's function as a depository, lender, trustee or agent. At this

hearing the president of ADAPSO testified in support of H.R. 9548 and recommended that its scope be broadened to prohibit banks expressly from engaging in the general data processing and computer business except for their own internal operations. ADAPSO's statement concluded with the admission that the Bank Service Corporation Act only limited bank subsidiaries to the performance of computer services for banks, and that "[a]dditional legislation restricting the banks themselves from engaging directly in the commercial data processing business is now urgently needed." (Hearings in H.R. 9548 and H.R. 9822, 88th Congress, page 72.)

The American Bankers Association testified in opposition to H.R. 9548 and in support of the continued performance of automated customer services by banks. (Hearings on H.R. 9548 and H.R. 9822, 88th Congress, pages 120 to 138.)

Despite petitioners' plea for statutory protection against bank competition, H.R. 9548 was not reported from the House Banking and Currency Committee and did not become law.

In April and June, 1965, hearings were held on H.R. 107 and H.R. 6885, 89th Congress, on the subject of Consolidation of Bank Examining and Supervising Functions. During the testimony of the Comptroller of the Currency, James J. Saxon, the question of the authority of national banks to perform data processing services for other banks and bank customers was discussed, and the legal basis for the Comptroller's ruling on this point was attacked and defended.[11] No legisla-

[11] In footnote 22 on page 34 of their brief, petitioners quote the arguments made by the House Committee Staff against the Comptroller's position that national banks had authority to perform data processing services for other banks and bank customers. It seems

tion restricting the performance by banks of data processing services for other banks or bank customers resulted from these hearings.

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appropriate to call to the Court's attention that equal prominence was given in the record to the following arguments by the Comptroller in support of his position (Hearings on H.R. 107 and H.R. 6885, 89th Congress, page 394; Hearings on H.R. 112, H.R. 117 and H.R. 10529, 89th Congress, pages 27-28):

17. Use of data-processing equipment

It is stated in paragraph 3500 of the "Comptroller's Manual" that a national bank may make available, for the use of others, data-processing equipment acquired for the primary purpose of performing service incidental to banking. This ruling is challenged on the grounds that it is not provided for by law, and that it is contrary to the intent of Congress expressed in the Bank Service Corporation Act (12 U.S.C. 1861-1865) prohibiting any data-processing activity other than the performance of bank services for banks.

The objections are groundless in light of the provisions contained in 12 U.S.C. 24 and 12 U.S.C. 1861-1865. A national bank may clearly own and operate data-processing equipment under 12 U.S.C. 24 which authorizes it to exercise all such incidental powers as shall be necessary to carry on the business of banking. It is fundamental that if a bank is to achieve the full utilization of its investment in such equipment, it must make it available for the use of others even though it is acquired for the primary purpose of performing services incidental to banking. This conclusion is entirely consistent with and supported by the judicially recognized right of a national bank, to lease or construct a building for banking purposes even though, in order to achieve a maximum return on its investment, it intends to occupy only a part thereof and to rent out a large part of the building to others. The Bank Service Corporation Act (12 U.S.C. 1861-1865) recognizes the right of small- and medium-sized banks to organize and invest in bank service corporations to provide service comparable to that offered by the largest banks. However, nothing contained in either the act or its legislative history precludes a bank from owning its own data-processing equipment or from sharing in the ownership of such equipment through a corporation owned by it with individuals or with corporations other than banks.

In March of 1966, hearings were held by the Subcommittee on Bank Supervision and Insurance of the House Banking and Currency Committee on H.R. 112, H.R. 117 and H.R. 10529, 89th Congress. H.R. 112 and H.R. 10529 would have prohibited banks from performing bank services for other banks and bank customers. Representatives of ADAPSO testified in support of these bills, and in opposition to the continuance by banks of this practice. The American Bankers Association testified in opposition to these bills, taking the position that the performance of these services was lawful and desirable. H.R. 112 and H.R. 10529 were not reported from the House Banking and Currency Committee and were not enacted into law.

The Antilottery Law—P.L. 90-203

Further Congressional recognition of the fact that data processing is a common bank service performed for customers and a specific Congressional rejection of an opportunity to enact legislation to protect petitioners' competitive interests occurred during the development of H.R. 10595 in the 90th Congress. This House bill, designed "to prohibit certain banks and savings and loan associations from fostering or participating in gambling activities," initially contained a provision to prohibit banks from performing data processing services for lotteries. The bill would have made it illegal for insured banks and savings and loan associations to "deal in" lottery tickets or to publicize or "keep any record of the existence or identity of any participant or winner, as such, in a lottery." "Deal in" was defined as "making, taking, buying, selling, redeeming, collecting, keeping any books or records with respect to, or otherwise handling in any way."

During hearings before the Subcommittee on Financial Institutions of the Senate Committee on Banking and Currency, Senator McIntyre of New Hampshire voiced his concern that H.R. 10595 as drafted by the House would prevent banks from performing for the New Hampshire Sweepstakes Commission certain bank services, including data processing, which they normally perform for other businesses and individuals. His letter to the committee states:

> In obedience to its responsibilities under state law, the Commission has entered into a number of relationships with financial institutions which do not at all differ from the relationships which those institutions have with many respectable, law-abiding businesses and individuals.
>
> For example, the Sweepstakes Commission maintains a checking account in a commercial bank. It leases safe deposit facilities. It has contracted for time on automatic data processing equipment.
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> These relationships with financial institutions are clearly within the right of an agency of a State of the United States. Nevertheless, it is my belief that each of them would be prohibited by the enactment of H.R. 10595. I would hope that the Subcommittee on Financial Institutions would find it possible to amend H.R. 10595 so that State agencies would be permitted to continue making normal use of financial institutions, regardless of the particular responsibilities of those agencies. (Senate hearings on H.R. 10595, page 21.)

In response to Senator McIntyre's request the Senate Committee on Banking and Currency amended the House bill by deleting the prohibitions on record keeping, bookkeeping and "otherwise handling" lottery tickets. ~~(Senate hearings on H.R. 10595, page 21.)~~ At page 5 of the committee report filed for Senator

Proxmire by Senator Byrd of West Virginia (Senate Report No. 727, 90th Congress, November 6, 1967), Senator Proxmire made the following statement for the committee as to the purpose and effect of these amendments:

> In recommending this legislation, the committee approved amendments which permit federally insured banks and savings and loan associations to engage in record keeping activities and to perform other custodial functions on behalf of the State lottery. Such institutions would be forbidden to sell lottery tickets directly to the public or to advertise or promote the lottery, but they could perform other services such as record keeping, data processing, as well as the acceptance of the proceeds of the lottery ticket sales for delivery, payment, or transfer to the State. Banks would also be permitted to distribute lottery tickets to duly authorized sales agents of the State and could make payment to the winners in such lotteries. Since these are common bank services which are already performed for other bank customers, the committee does not believe it feasible or practical to prohibit banks from performing these same services on behalf of a State lottery. However, the direct sale of lottery tickets to the general public is not incident to the business of banking and would be prohibited by the bill.

Senator McIntyre in his Individual Views (printed in the Senate Report at page 21) also made the following comments with respect to the amendments:

> I do feel that the bill reported out by the committee is a clear improvement over the bill as it was received from the House. The committee amendments, adopted with no opposition, make it clear that the committee does not intend to interfere with such functions of financial institutions—

safe-keeping and distribution, data processing, maintaining demand deposits, etc., which they may wish to perform for State-operated lotteries on the same basis as may be done for other customers.

The Committee amendments, although agreed to by the Senate, were not accepted by the House and a Conference Committee was appointed. The Committee rewrote the text of the bill, retaining the substance of the Senate amendments. The House provisions which would have prohibited data processing were not included in the conference bill, and instead the report included a statement of intention not to prohibit lawful banking services.[12]

On December 12, 1967, the House considered an approved the conference report. Congressman Patman, Chairman of the House Banking and Currency Committee, pointed out that "[t]he prohibition dealing with redeeming, collecting, bookkeeping, and record activities was deleted from the House bill by the Senate" and he stated that this deletion was accepted by the conferees so that "insured financial institutions, where authorized by law, may perform bookkeeping and record service for authorized State lotteries." (113 Cong. Rec. 35954).

Congressman Ashley, a member of the House Banking and Currency Committee and one of the House conferees on H.R. 10595, discussed the Senate amendments and their significance in some detail. (113 Cong. Rec. 35955-6). He quoted from Senator McIntyre's

[12] The House Conferees in their statement to the House on the effect of the amendments to the House bill stated that the bill was not intended to give any new authority to banks to perform data processing services or to take away any existing authority. House Report No. 1018, 90th Congress.

letter to the Senate Banking and Currency Committee (see page 25 above) and from that Committee's report (see page 26 above) in order to make it clear that the Senate Committee and the Senate were fully aware that the Senate Committee amendments, adopted at Senator McIntyre's request—which were incorporated in substance in the conference bill Congressman Ashley was urging the House to adopt—were intended to permit banks to continue to provide to lotteries "common bank services which are already performed for other bank customers," including specifically data processing. (113 Cong. Rec. 35955-6).

Congressman Ashley continued with the following remarks on the legislative history of H.R. 10595 and its significance, after which the House approved the bill and sent it to the President for his signature:

> The House bill would clearly have prohibited insured banks and savings and loan associations from performing bookkeeping, data processing, and similar services for lotteries. The Senate amendments deleted these prohibitions, and the conference bill now before the House contains nothing whatever which authorizes or permits banks or savings and loan associations to perform data processing services for State lotteries, and nothing whatever which prohibits banks or savings and loan associations from performing data processing services for State lotteries, or for anyone else.
>
> In other words, the conference version of the bill is completely silent and neutral with respect to data processing and the existing law on the subject would not be affected in any respect by the Senate version of the bill.
>
> The deletion by the Senate of the prohibition in the House bill against the performance by banks

of data processing services in connection with lotteries is not, of course, in itself a grant of authority to perform such services. Such authority must be found elsewhere in the statute, primarily in the National Bank Act in the case of national banks and in the State banking codes in the case of State banks. It is appropriate, however, to point out that the prohibition would have been unnecessary and meaningless unless there was authority elsewhere, and the deletion of the prohibition would likewise have been ineffective and meaningless unless there was authority elsewhere. (113 Cong. Rec. 35955-6).

CONCLUSIONS

1. The purpose of the Bank Service Corporation Act was to authorize banks to own stock in subsidiary corporations.

2. The purpose of Section 4 of the Bank Service Corporation Act was to restrict the activities of bank service corporations; Section 4 does not apply to the activities of banks and it was not intended to protect anyone from the activities of banks.

3. The performance of data processing by banks was repeatedly brought to the attention of Congress and Congress repeatedly refused to approve proposals prohibiting such banks from performing data processing activities for other banks and bank customers.

4. Neither Section 4 of the Bank Service Corporation Act nor the entire Act evidences a Congressional concern to protect data processors from competition by national banks sufficient to support petitioners' claim of standing to attack the validity of an order of the Comptroller of the Currency authorizing national banks to perform data processing services for other

banks or bank customers; on the contrary, the legislative history of the Bank Service Corporation Act and subsequent legislative proposals clearly evidence a Congressional purpose not to provide such protection.

Respectfully submitted,

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